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**IN THE  
COURT OF APPEALS OF INDIANA**

BRANDY CHASE, INC.,

Appellant-Defendant,

VS.

BIG ROCK DEVELOPMENT, LLC,

Appellee-Plaintiff.

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No. 02A03-0608-CV-375

APPEAL FROM THE ALLEN SUPERIOR COURT  
The Honorable Stanley A. Levine, Judge  
Cause No. 02D01-0501-CC-80

**April 30, 2007**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BAKER, Chief Judge**

Appellant-defendant Brandy Chase, Inc. (Brandy Chase), appeals from the trial court's grant of partial summary judgment in favor of appellee-plaintiff Big Rock Development, Inc. (Big Rock). Specifically, Brandy Chase argues that the trial court erred in finding that the parties' real estate sale contract required Brandy Chase to pay a prorated portion of the prorated property taxes that were incurred prior to closing. Additionally, both parties argue that the trial court erroneously denied their respective requests for attorney fees and costs. Finding no error, we affirm the judgment of the trial court.

### FACTS

On October 30, 2002, Brandy Chase and Big Rock entered into a contract (Contract), pursuant to which Brandy Chase sold to Big Rock, among other things, a parcel of real estate in Allen County containing 170 apartment units (the Property). The parties agreed that closing would take place on or before December 31, 2002. The Contract contained the following provision regarding the payment of property taxes:

Real estate and personal property taxes (collectively, "Property Taxes") with respect to the Property for the year 2001, payable 2002, and all Property Taxes for prior years will be paid in full by [Brandy Chase] prior to the Closing Date, provided that [Brandy Chase] may contest such taxes if security to ensure payment which is acceptable to [Big Rock] is given prior to the Closing Date. Property Taxes for 2002, payable in 2003, will be prorated as the Closing Date, with the Closing Date to be [Big Rock]'s day, based upon a 365 or 366 day year, as the case may be. At the closing, if the tax amount is not then determinable, the proration will be based upon the last determinable tax amount. [Big Rock] will pay all Property Taxes first payable after the Closing Date.

Appellant's App. p. 204.

The Contract was subsequently amended by letter on December 12, 2002, and February 19, 2003. The closing date was extended to March 14, 2003. Neither amendment addressed the proration of 2003 Property taxes.

At the time of closing, Allen County had yet to complete its countywide tax reassessment; consequently, the 2002 Property taxes—payable in 2003—had not yet been determined. Thus, the 2002 Property taxes were prorated pursuant to the Contract's terms and, at closing, Brandy Chase gave Big Rock a credit in the amount of \$66,805.44. Big Rock refused to close the transaction unless Brandy Chase also gave Big Rock a credit toward the prorated 2003 Property taxes that would be payable in 2004. Brandy Chase agreed and paid Big Rock an additional \$13,178.06 for the prorated 2003 Property taxes. The credits are reflected on the closing statement that was part of the closing transaction.

After the transaction closed, Allen County completed the Property tax assessment and determined that the 2002 Property taxes totaled \$108,172.54 and the 2003 Property taxes totaled \$122,548.31. Big Rock successfully appealed the 2002 and 2003 Property tax determinations. Thus, on March 23, 2004, the 2002 Property taxes were reduced to \$82,977.51 and the 2003 Property taxes were reduced to \$80,904.31.

At some point, Big Rock demanded that Brandy Chase pay the balance of the 2002 and prorated 2003 Property taxes. Brandy Chase refused.<sup>1</sup> On January 25, 2005, Big Rock filed a complaint against Brandy Chase, seeking damages, attorney fees, and costs stemming

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<sup>1</sup> Brandy Chase conceded that it was responsible for paying the 2002 Property taxes; it merely disagreed with the amount sought by Big Rock. Brandy Chase did not, however, pay the portion of the Property taxes for which it acknowledged responsibility.

from Brandy Chase's alleged breach of contract for its refusal to pay the balance of the 2002 and prorated 2003 Property taxes. In addition to attorney fees and costs, Big Rock sought \$16,172.07 for the balance of the 2002 Property taxes and \$2,781.15 for the balance of the prorated 2003 Property taxes.<sup>2</sup>

On September 30, 2005, Brandy Chase filed a motion for summary judgment, arguing that it was not liable for the prorated 2003 Property taxes and disputing the amount sought by Big Rock for the 2002 Property taxes. Brandy Chase conceded that it was liable for some portion of the 2002 Property taxes. On November 2, 2005, Big Rock filed a cross-motion for summary judgment, arguing that, in addition to the tax payments, it was owed a fee for its successful appeal of the Property tax assessments. On March 7, 2006, the trial court granted Brandy Chase's motion for summary judgment, awarded attorney fees to Brandy Chase, and denied Big Rock's cross-motion for summary judgment.

On March 16, 2006, Big Rock filed a motion to reconsider the summary judgment order. Following a hearing, the trial court granted Big Rock's motion to reconsider in part on May 12, 2006, finding that Brandy Chase was required to pay the requested sums for the 2002 and prorated 2003 Property taxes and that Brandy Chase was not entitled to attorney fees. The trial court denied Big Rock's request for attorney fees. On June 5, 2006, Brandy Chase filed a motion to correct error, which the trial court denied on July 19, 2006. Brandy

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<sup>2</sup> For some unknown reason, Big Rock's complaint sought damages based on the initial, higher Property tax assessment for the years in question. Moreover, Big Rock has never amended its complaint to reflect the tax values as determined following its appeal. Only after Brandy Chase brought the reassessed property tax bills to the trial court's attention did Big Rock revise the amount of requested damages.

Chase now appeals. In addition, Big Rock cross-appeals the trial court's determination that Big Rock was not entitled to attorney fees.

## DISCUSSION AND DECISION

### I. Standard of Review

The somewhat peculiar procedural posture presented by this matter is as follows: the trial court granted summary judgment in Brandy Chase's favor, subsequently reversed itself upon reconsideration and granted partial summary judgment in Big Rock's favor, and then denied Brandy Chase's motion to correct error. Ultimately, we must determine whether the trial court properly granted summary judgment in Big Rock's favor. See Rishel v. Estate of Rishel ex rel. Gilbert, 781 N.E.2d 735, 738 (Ind. Ct. App. 2003) (holding that when a motion to correct error is based on a claim that the trial court erred in ruling on a summary judgment motion, we review the grant or denial of summary judgment).

Summary judgment is appropriate only if the pleadings and evidence considered by the trial court show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Owens Corning Fiberglass Corp. v. Cobb, 754 N.E.2d 905, 909 (Ind. 2001); see also Ind. Trial Rule 56(C). On a motion for summary judgment, all doubts as to the existence of material issues of fact must be resolved against the moving party. Owens Corning, 754 N.E.2d at 909. Additionally, all facts and reasonable inferences from those facts are construed in favor of the nonmoving party. Id. If there is any doubt as to what conclusion a jury could reach, then summary judgment is improper. Id.

An appellate court faces the same issues that were before the trial court and follows the same process. Id. at 908. The party appealing from a summary judgment decision has

the burden of persuading the court that the grant or denial of summary judgment was erroneous. Id. When a trial court grants summary judgment, we carefully scrutinize that determination to ensure that a party was not improperly prevented from having his or her day in court. Id.

### I. Prorated Property Tax Payments

Brandy Chase argues that the trial court erred in concluding that the Contract required Brandy Chase to pay the prorated portion of the 2003 Property taxes that were incurred prior to closing.<sup>3</sup> The basic tenets of contract interpretation are well established:

“The unambiguous language of a contract is conclusive upon the parties to the contract and upon the courts. If the language of the instrument is unambiguous, the intent of the parties is determined from the four corners of that instrument. If, however, a contract is ambiguous or uncertain, its meaning is to be determined by extrinsic evidence and its construction is a matter for the fact finder. In interpreting a written contract, the court should attempt to determine the intent of the parties at the time the contract was made as discovered by the language used to express their rights and duties. The contract is to be read as a whole when trying to ascertain the intent of the parties. The court will make all attempts to construe the language in a contract so as not to render any words, phrases, or terms ineffective or meaningless. The court must accept an interpretation of the contract which harmonizes its provisions as opposed to one which causes the provisions to be conflicting.”

S.C. Nestel, Inc. v. Future Const., Inc., 836 N.E.2d 445, 449-50 (Ind. Ct. App. 2005) (quoting Peoples Bank & Trust Co. v. Price, 714 N.E.2d 712, 716-17 (Ind. Ct. App. 1999)).

Here, Section 9 of the Contract provides as follows:

Real estate and personal property taxes (collectively, “Property Taxes”) with respect to the Property for the year 2001, payable 2002, and all

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<sup>3</sup> Brandy Chase does not appeal the trial court’s ruling regarding the 2002 Property taxes.

Property Taxes for prior years will be paid in full by [Brandy Chase] prior to the Closing Date, provided that [Brandy Chase] may contest such taxes if security to ensure payment which is acceptable to [Big Rock] is given prior to the Closing Date. Property Taxes for 2002, payable in 2003, will be prorated as the Closing Date, with the Closing Date to be [Big Rock]'s day, based upon a 365 or 366 day year, as the case may be. At the closing, if the tax amount is not then determinable, the proration will be based upon the last determinable tax amount. [Big Rock] will pay all Property Taxes first payable after the Closing Date.

Appellant's App. p. 204. The Contract originally required that closing would take place on or before December 31, 2002. Id. at 263. The parties amended the Contract by letter on February 19, 2002, however, and extended the transaction's time frame, eventually closing on March 14, 2003. Thus, this litigation stems from the Contract's silence regarding the prorated 2003 Property taxes that accrued between the beginning of 2003 and the new, amended Closing Date. Brandy Chase insists that this silence means that it is not required to pay the prorated 2003 Property taxes.

Our examination of the Contract and the amendment thereto, however, leads us to arrive at a different conclusion. It is apparent that the parties intended that Brandy Chase would pay all Property taxes incurred prior to the Closing Date and that Big Rock would pay all Property taxes incurred thereafter. That the parties extended the Closing Date has no effect on their intention regarding the payment of Property taxes. Thus, it is of no moment that there is no explicit provision in the amendment mandating that Brandy Chase pay the prorated 2003 Property taxes incurred prior to closing. Under these circumstances, we find

that the trial court properly awarded summary judgment in favor of Big Rock on the issue of the prorated 2003 Property taxes.<sup>4</sup>

## II. Attorney Fees and Costs

Both parties claim that they are entitled to attorney fees and costs pursuant to the Contract; the trial court denied both requests. The Contract provides as follows:

In the event any party to this Contract is compelled to enforce its provisions in litigation commenced against another party hereto, then the prevailing party in such litigation will be entitled to recover its reasonable attorney fees, court costs and other litigation expenses from the non-prevailing party in such litigation.

Appellant's App. p. 214. The term "prevailing party" is not defined by the Contract. Inasmuch as we have concluded that the trial court properly granted summary judgment in favor of Big Rock, it is apparent that Brandy Chase is not a prevailing party and, consequently, is not entitled to attorney fees.

Turning to Big Rock's request for fees and costs pursuant to the Contract, the trial court found as follows:

6. . . . In the first place, if one compares the amounts requested in [Big Rock]'s Complaint to the amount of the above judgment, which is considerably less than the amount in excess of \$52,000 requested in the complaint, there is some question of whether [Big Rock] is the prevailing party. Not so parenthetically it should be noted that [Big Rock] did not prevail on its request that [Brandy Chase] pay a fee to [Big Rock] for appealing the taxes, which request was contained in its request for Summary Judgment, though not in the Complaint.

Notwithstanding [Big Rock]'s argument that because it is granted a money judgment in this case, it is the prevailing party and therefore entitled to its attorney fees paid by [Brandy Chase], the Court notes that the aforesaid clause

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<sup>4</sup> Inasmuch as we reach this conclusion based solely on the language of the Contract and the amendment thereto, we need not consider the propriety of the trial court's reliance upon the Closing Statement.



of the contract provides that the prevailing party must be “compelled to enforce its provisions in litigation commenced against the other party.”

7. In this regard, the Court notes that [Big Rock] filed this lawsuit on January 23, 2005, and [Big Rock]’s counsel acknowledged that the appeal process for the real estate taxes “ended on March 23, 2004,” [nearly one year before the lawsuit was filed.] [Big Rock]’s counsel also admitted that the numbers in the Complaint and the numbers in its demand letter to [Brandy Chase] “were in error.”
8. While this Court has some reservation in determining that [Big Rock] is the prevailing party in this lawsuit, it does unequivocally determine that [Big Rock] was not compelled to enforce provisions of a contract by commencing litigation against [Brandy Chase]. Therefore, [Big Rock]’s request for attorney fees is DENIED . . . .

Id. at 314 (emphases in original).

As noted by the trial court and herein, Big Rock’s complaint sought damages based on the initial, higher Property tax assessment for the years in question even though its appeal of the assessment was successful nearly a year before it filed the instant lawsuit. Moreover, Big Rock has never amended its complaint to reflect the tax values as determined following its appeal. Only after Brandy Chase brought the reassessed property tax bills to the trial court’s attention did Big Rock revise the amount of requested damages. Thus, the amount awarded to Big Rock by the trial court was far less than what it had—unjustifiably—requested. Moreover, the trial court denied Big Rock’s request for reimbursement of the funds it spent appealing the Property tax assessment. Under these circumstances, Big Rock is not a prevailing party and the trial court properly refused to award it attorney fees and costs.

The judgment of the trial court is affirmed.

FRIEDLANDER, J., and CRONE, J., concur.